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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

No. 89-1217

JAMES P. LEHNERT, *et al.*,
Petitioners,
v.
THE FERRIS FACULTY ASSOCIATION-MEA-NEA, *et al.*,
Respondents.

On Writ of *Certiorari* to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES COUNCILS 1, 52, 71, 73, COMMUNICATIONS WORKERS OF AMERICA, NEW JERSEY STATE FEDERATION OF TEACHERS, AND RUTGERS COUNCIL OF A.A.U.P. CHAPTERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

This brief *amici curiae* is filed with the consent of the parties as provided for in this Court's Rules.

INTEREST OF THE *AMICI CURIAE*

American Federation of State, County and Municipal Employees Councils 1, 52, 71 and 73 represent 25,000 public employees in New Jersey, 9,000 of whom are employed by the State government. The Communications Workers of America represents 55,000 public employees in New Jersey, 40,000 of whom are employed by the State government. The New Jersey Federation of Teachers has forty-seven local affiliates, which represent 8,000

public employees, most of whom are employed by local school systems. The Rutgers Council of A.A.U.P. Chapters represents 5,000 faculty members and librarians employed at the New Brunswick, Newark and Camden, New Jersey campuses of Rutgers University.

Each of these labor organizations has negotiated representation fee agreements, and each uses a portion of the funds so collected to engage in the employment-related lobbying expressly provided for by the New Jersey Employer-Employee Relations Act. The organizations engage in this lobbying because they believe that it is necessary to participate in the legislative and regulatory processes in order to effectively perform their roles as employee representatives. Because one of the issues in this case concerns the constitutionality of statutes such as N.J.S.A. 34:13A-5.5, which authorize the use of representation fees to support employment-related lobbying, the above New Jersey labor organizations file this brief addressed to this issue.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court of Appeals, in considering and rejecting the objecting employees' constitutional challenge to the Ferris Faculty Association's charge to all the employees the Association represents of the costs of the Association's "Preserve Public Education Program", began from the following premise:

> To represent their members effectively, public sector unions must necessarily concern themselves not only with negotiations at the bargaining table but also with advancing their members' interest in [the] legislative . . . arena[] . . . . We therefore agree with the opinion of the Third Circuit in *Robinson v. State of New Jersey*, 741 F.2d 598 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985), and hold that lobbying . . . by a public employee union that [is] "pertinent to the duties of the union as a bargaining representative" may be constitutionally charged to dissenting employees. 741 F.2d at 609. [Pet. App. 7a.]

The argument that follows is devoted to demonstrating that the court below was entirely correct in this regard.

The Michigan Legislature, in the statute under review here, has provided that certain terms and conditions of public employment are to be settled through collective bargaining where a group of employees choose an exclusive representative to bargain on their behalf with their employer. *See Abood v. Detroit Board of Education*, 431 U.S. 209, 223-224 (1977) (discussing the Michigan statute). While in theory such legislation could provide that all terms and conditions of employment are to be decided through that process, so far as we are aware such a far-reaching approach has never been attempted. Instead, in the public sector, as in the private sector, public law establishes many of the basic employment conditions. *Compare, e.g., Ft. Halifax Packing Co. v. Coyne*, 481 U.S. 1, 19-23 (1987) (in the private sector, state laws establish minimum substantive labor standards).

State legislatures have, in other words, been reluctant to allow the Executive Branch, acting as the public employer, to set all terms and conditions of public employment unilaterally or through collective bargaining. *See, e.g.*, Edwards, Clark and Craver, *Labor Relations Law in the Public Sector*, 293-407 (3d ed. 1985) (collecting relevant materials). And, it is, of course, for the legislature to decide whether any given matter will be settled through a process in which the legislature itself, and hence the public, has an active role or through a process such as collective bargaining in which the legislature and the public do not play such a role. *See Minnesota Board for Community Colleges v. Knight*, 465 U.S. 271, 285 (1984) ("However wise or practicable various levels of public participation in various kinds of policy decisions may be, this Court has never held, and nothing in the Constitution suggests it should hold, that government must provide for such participation").

The New Jersey Legislature and the State Supreme Court have given particularly explicit, detailed and ma-

ture consideration to the balance between legislative decisionmaking with respect to the substance of the public employee-public employer relationship on the one hand, and collective bargaining decisionmaking on the other. Most to the point here, New Jersey has made it plain that the State's program for public sector industrial peace is in evolution and that the Legislative Branch is committed to an active and continuing role in framing and reframing that program. New Jersey has also recognized that the Legislature needs the active participation in its deliberations not only of the citizenry at large but of both the Executive Branch, as the employer, and of public employees through their majority representatives.

The foundation of the State's program for industrial peace, in other words, is legislative action to perfect the current labor-management rules that is the product of a process of discussion that includes both the Executive Branch and majority employee representatives. In this regard, the New Jersey statute expressly provides that where a "representation share fee" agreement is in force, union lobbying on employment matters *is* chargeable to all represented employees. This provision has been upheld against constitutional challenges in thoughtful opinions by both the Third Circuit and the State Supreme Court. *See Boonton Bd. of Ed. v. Kramer*, 99 N.J. 523, 494 A.2d 279, 285-292 (1985), *cert. denied*, 475 U.S. 1070 (1986); *Robinson v. New Jersey*, 741 F.2d 598, 604-610 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985).

The decisions of the Third Circuit and the New Jersey Supreme Court with respect to the use of representation fees for employment-related lobbying are fully in accord with this Court's recent decision in *Keller v. State Bar of California*, —— U.S. ——, 110 S.Ct. 2237 (1990), addressed to the use of compulsory bar association dues for lobbying. In *Keller*, the Court held that all attorneys may be required to provide financial support to "those State Bar activities in which the officials and members

of the Bar are acting essentially as professional advisors to those ultimately charged with the regulation of the legal profession. . . ." *Id.* at 2237.

The state purpose in establishing such a requirement "is for recommendations as to admission to practice, the disciplining of lawyers, codes of conduct, and the like to be made to the courts or the legislature by the organized bar that are in the nature of specialized professional advice to those with the ultimate responsibility of governing the legal profession." *Id.* at 2235. Required bar dues, the Court added, may *not* be used, however, to support "activities having political or ideological coloration which are not reasonably related to the advancement of such goals. . . ." *Id.* at 2237.

Under *Keller* then, there is *no* constitutional barrier to a state's decision that members of a certain occupational group must financially support an association charged with advising the state on the regulations governing the occupation.

As we have noted, it is common for state legislatures to divide "the ultimate responsibility of governing" the terms and conditions of public employment between the Executive Branch and the Legislative Branch. While most of the executive decisions in this regard are typically assigned to the process of collective bargaining, many important decisions are frequently reserved to the legislature or to executive decisionmaking outside the bargaining process. With respect to those employment decisions excluded from bargaining, the state interest in seeing that those with "ultimate responsibility" for deciding such matters receive "specialized professional advice" on the employees' interests from their chosen representative is as great as the interest *Keller* identifies in hearing from the state bar association on matters concerning governance of the legal profession.

As we now demonstrate, the New Jersey Supreme Court's *Boonton* analysis, buttressing as it does the judgment of the New Jersey Legislature with respect to the

best ordering of the State's labor relations, makes a particularly cogent showing of what the state interest in permitting public sector unions to charge all represented employees for the cost of employment-related lobbying consists of and why that interest overrides the constitutional claims of objecting employees such as the one made here. In what follows, we therefore carefully trace the teachings of the New Jersey Supreme Court with respect to the operation of that State's labor relations system.

In part 1 of the argument that follows we discuss the New Jersey law governing representation fee agreements in that State's public sector. Pp. 6-8, *infra*. In part 2, we describe in some detail the public sector labor relations system established by the New Jersey legislature. Pp. 8-20, *infra*. In part 3, we discuss the State's interest in permitting unions to use representation fees to finance employment-related lobbying. Pp. 20-28, *infra*. Finally, in point 4 we show that New Jersey's decision to allow the use of representation fees for such lobbying is constitutional. Pp. 28-30, *infra*.

ARGUMENT

I. THE NEW JERSEY LAW ON "REPRESENTATION FEE" AGREEMENTS IN THE PUBLIC SECTOR.

Section 5.5a of the New Jersey Public Employer-Employee Relations Act allows a public employer and the union chosen as the majority representative by a unit of employees to include in their collective agreement a requirement that each nonmember employee in the unit pay "a representation fee in lieu of dues for services rendered by the majority representative." N.J.S.A. 34:13A-5.5a.

This representation fee may not exceed 85 percent of regular membership dues, may not include any costs of member-only benefits, and may not be based on "the employee's additional pro rata share of expenditures by the majority representative that is . . . in aid of activities or

causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment. . . ." N.J.S.A. 34:13A-5.5b&c. Equally to the point here, the New Jersey statute expressly provides that

> . . . the cost of support of lobbying activities designed to foster policy goals in collective negotiations and contract administration or to secure for the employees represented advantages in wages, hours and other conditions of employment in addition to those secured through collective negotiations with the public employer are chargeable to all employees in the bargaining unit. [N.J.S.A. 34:13A-5.5c.]

Both the New Jersey Supreme Court and the United States Court of Appeals for the Third Circuit have upheld this limited authorization to charge for lobbying activities against First Amendment challenges. *Boonton Board of Education v. Kramer*, 99 N.J. 523, 494 A.2d 179, 285-292 (1985), *cert. denied*, 475 U.S. 1070 (1986); *Robinson v. New Jersey*, 741 F.2d 598, 604-610 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985). The New Jersey Supreme Court held that the authorization for certain lobbying charges is constitutional "since it furthers the state's sgnificant interest in public-employment stability without encroaching impermissibly on the rights of free speech and association. . . ." 494 A.2d at 548. In this regard, the New Jersey Court explained:

> The statute's broad recognition of lobbying activities as an essential element of public employee union activity accurately reflects the significant quantum of public employee rights and benefits that are determined outside the collective-negotiation process. Public employees in New Jersey are substantially affected by state and local budgetary decisions and by the various laws and regulations that determine conditions of employment as much as, if not more than, by the negotiations conducted by their majority representative. Indeed, many of the most important benefits of public employment are determined

by statute and a public employee union that ignored this reality would not represent properly the member and nonmembers in its bargaining unit. [*Id.* at 290-291.] [1]

II. THE NEW JERSEY PUBLIC SECTOR LABOR RELATIONS SYSTEM.

The essence of New Jersey's public sector labor relations system is set out in the New Jersey Employer-Employee Relations Act, enacted in 1968. But the provisions of that statute can only be fully understood against the backdrop of rights provided to public employees by the New Jersey Constitution adopted in 1947. As the New Jersey Supreme Court has put it, "[t]he ultimate touchstone for any analysis of public employment labor relations in this state is Art. I, par. 19 of the New Jersey Constitution of 1947. . . ." *Red Bank Regional Education Ass'n v. Red Bank Bd. of Ed.*, 78 N.J. 122, 393 A.2d 267, 272 (1978).

Article I, paragraph 19 of the New Jersey Constitution provides:

> Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions, their grievances and proposals through representatives of their own choosing.

This constitutional provision imposes on an employer in the public sector "the duty to meet with its employees or

[1] In a decision that preceded *Boonton Board of Education v. Kramer, supra*, the Third Circuit reached the same conclusion with respect to the relationship between lobbying and collective bargaining in the New Jersey public sector:

> For New Jersey public employees, collective bargaining is inextricably intertwined with legislative change. An examination of the mechanics of New Jersey's public employee collective bargaining agreements reveals the large extent to which the standard terms and conditions of employment under the NLRA or the RLA are governed by state statute or regulation. [*Robinson v. New Jersey, supra*, 741 F.2d at 609.]

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their chosen representative and to consider in good faith any grievance or proposals presented on their behalf." *Lullo v. Fire Fighters Local 1066*, 55 N.J. 409, 262 A.2d 681, 684 (1970). This right of public employees is in addition to their right as citizens to petition the government. "New Jersey public employees possess a constitutional right by virtue of their governmental employment which they would not otherwise possess as citizens—the right to compel government, in its capacity as their employer, to sit down and listen to their grievances and proposals." *Twp. of West Windsor v. PERC*, 78 N.J. 98, 393 A.2d 255, 262 (1978).

The New Jersey Employer-Employee Relations Act, in turn, "extended [to public employees] rights of collective representation more nearly approximating those enjoyed by private sector employees than had been the case when their sole source of organization rights was *N.J. Const.* (1947), Art. I, para. 19." *State v. State Supervisory Employees Ass'n*, 78 N.J. 54, 393 A.2d 233, 239 (1978). The centerpiece of this Act is section 5.3, which provides:

> Representatives designated or selected by public employees for the purposes of collective negotiation by the majority of the employees in a unit appropriate for such purposes . . . shall be the exclusive representative for collective negotiation concerning the terms and conditions of employment of the employees in such unit. [N.J.S.A. 34:13A-5.3.]

That section further provides:

> Proposed new rules or modification of existing rules governing working conditions shall be negotiated with the majority representative before they are established. In addition, the majority representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes and other terms and conditions of employment. [*Id.*]

A union chosen as the majority representative under the Employer-Employee Relations Act assumes an official

status as the employees' representative for more than the "collective negotiations" defined by the statute. The New Jersey Supreme Court has found in the statute a legislative intent "that a majority representative be considered as the 'representative[] of the [unit employees'] own choosing' under Art. I, para. 19 [of the New Jersey Constitution] with respect to grievance presentation as well." *Red Bank Regional Ed. Ass'n v. Red Bank Bd. of Ed., supra*, 393 A.2d at 273.

The New Jersey Supreme Court has identified three purposes served by the statutory system of exclusive representation, in addition to furthering the "basic right[]," accorded public employees by the New Jersey Constitution, "to organize, present and make known to their public employers their grievances and proposals through representatives of their own choosing." *Lullo v. Fire Fighters Local 1066, supra*, 262 A.2d at 684.

First, the New Jersey Commission Report that led to the passage of the Employer-Employee Relations Act states unequivocally that "the public interest requires that public employers and public employees be provided with an effective procedure for the mutual resolution of disputes involving terms and conditions of employment." *Lullo v. Fire Fighters Local 1066, supra*, 262 A.2d at 685 (quoting Final Report to the Governor and the Legislature of the Public and School Employees Grievance Procedure Study Commission). The Legislature determined that exclusive representation was essential to any "effective procedure" for the resolution of labor disputes:

> The purpose was to discourage rivalries among individual employees and employee groups and to avoid the diffusion of negotiating strength which results from multiple representation. On the positive side the Legislature was seeking through the medium of the collective agreement to supersede separate agreements with employees and to substitute a single compact with terms which reflect the strength, negotiating power and welfare of the group. [*Id.* at 692.]

Second, the Legislature determined that public employees "have a legitimate need for a special means of access to government in its capacity as an employer with respect to problems and concerns arising from and affecting th[e] [employment] relationship." *Twp. of West Windsor v. PERC, supra*, 393 A.2d at 262. "[S]uch preferred access is necessary because of the fact that the political interests of the voting public, both as taxpayers and users of public services, are inherently adverse to the employment interests of public employees in better pay and working conditions." *Id.* To meet this need, New Jersey law grants public employees "preferred access to the governmental employer," which results in an "enhancement of the effectiveness of their voice in governmental decision-making" on terms and conditions of employment. *Id.* at 262-263.

Finally, the Legislature was concerned that an individual employee would "view[] the potential consequences of presenting a grievance in his own name with great trepidation. . . ." *Red Bank Regional Ed. Ass'n v. Red Bank Regional Bd. of Ed., supra*, 393 A.2d at 275. To relieve an individual of having "to put himself on the line" in order to have his employment interests made known, the State law gives employees the right to speak on these matters through representatives. *Id.*

A. "Collective Negotiation" Within the New Jersey System.

"Collective negotiation" under the New Jersey statute is not synonymous with "collective bargaining" as is practiced in the private sector. As the New Jersey Supreme Court has explained, "the authorization for 'collective negotiations' in the 1968 Act was designed to make know that there are salient differences between public and private employment relations which necessarily affect the characteristics of collective bargaining in the public sector." *Lullo v. Fire Fighters Local 1066, supra*, 262 A.2d at 698. There are "significant differences between N.J.S.A. 34:13A-5.3, which grants a right to 'col-

lective negotiations,' and 29 U.S.C. § 157, which grants a right to 'collective bargaining.'" *Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed.*, 78 N.J. 144, 393 A.2d 278, 285 (1978).

(i) The scope of "collective negotiations" under the New Jersey statute is defined as follows:

> [N]egotiable terms and conditions of employment are those matters which intimately and directly affect the work and welfare of public employees and on which negotiated agreement would not significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy. [*State v. State Supervisory Employees Ass'n, supra*, 393 A.2d at 239.]

Under this definition, "[p]ublic employment negotiation in New Jersey has divided into two distinct categories: matters that are nonnegotiable because they involve governmental policy and 'mandatorily negotiable terms and conditions of employment.'" *New Jersey State College Locals v. State Board of Higher Ed.*, 91 N.J. 18, 449 A.2d 1244, 1250 (1982).

In general, there are no "permissive" subjects of negotiation in the New Jersey public sector. *Id.* at 1250. n.4. *Compare Ridgefield Park Ed. Ass'n v. Ridgefield Bd. of Ed.*, 78 N.J. 144, 393 A.2d 278, 287 (1978), *with NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958).[2]

Thus, if a term or condition of employment involves "governmental policy," the public employer is *precluded* from negotiating about that term or condition.

(ii) In the New Jersey public sector, moreover, statutes and regulations that set terms and conditions of

[2] By an amendment to the Act, the New Jersey legislature created a limited "permissive" category of negotiation with respect to bargaining by police and firemen. *See Woodstown-Pilesgrove Bd. of Ed. v. Woodstown-Pilesgrove Ed. Ass'n*, 81 N.J. 582, 410 A.2d 1131, 1134 n.1 (1980).

employment normally limit the scope of collective negotiations rather than, as is frequently true in the private sector, merely stating minima that can be supplemented in collective bargaining:

> [S]pecific statutes or regulations which expressly set particular terms and conditions of employment . . . for public employees may not be contravened by negotiated agreement. For that reason, negotiation over matters so set by statutes or regulations is not permissible. [*State v. State Supervisory Employees Ass'n, supra*, 393 A.2d at 246.]

On the other hand, New Jersey statutes and regulations setting terms and conditions of employment become an *integral part of the negotiated collective agreement* covering affected employees:

> All such statutes and regulations which are applicable to the employees whose comprise a particular unit are effectively incorporated by reference as terms of any collective agreement covering that unit. [*Id.* at 246 (footnote omitted).]

Again, this New Jersey rule is distinct from the private sector rule under which the collective agreement's provisions and public law requirements are entirely distinct. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53 (1974) (in the private sector, "[t]he arbitrator . . . has no general authority to invoke public laws that conflict with the bargain between the parties"); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 744 (1981) ("the arbitrator is required to effectuate the intent of the parties, rather than to enforce the statute").

The New Jersey Supreme Court has "consolidate[d]" its teachings with respect to the scope of "collective negotiations" into a "three-part test for scope of negotiations determinations." *Wright v. East Orange Bd. of Ed.*, 99 N.J. 112, 491 A.2d 644, 646 (1985):

> First, a subject is negotiable only if it intimately and directly affects the work and welfare of public employees. Second, an item is not negotiable if it

has been preempted by statute or regulation. Third, a topic that affects the work and welfare of public employees is negotiable only if it is a matter on which negotiated agreement would not *significantly* interfere with the exercise of inherent management prerogative pertaining to the determination of government policy. [Citations and internal quotation marks omitted.]

See IFPTE Local 195 v. State, 88 N.J. 393, 443 A.2d 187, 191-192 (1982) (developing and explaining this three-part test).

* * *

In sum, the New Jersey legislature has created a labor relations system in which a "significant quantum of public employee rights and benefits . . . are determined outside the collective-negotiation process." *Boonton Bd. of Ed. v. Kramer, supra*, 494 A.2d at 290. Under that system, "[f]or New Jersey public employees, collective bargaining is inextricably intertwined with legislative change." *Robinson v. New Jersey, supra*, 741 F.2d at 609.

B. The Relationship Between Statutes and Regulations Setting Terms or Conditions of Employment and Collective Negotiations.

As we have seen, "specific statutes or regulation which expressly set particular terms and conditions of employment" both preempt collective negotiations with respect to such terms and conditions *and* "are effectively incorporated by reference as terms of any collective agreement covering that unit." *State v. Supervisory Employees Ass'n, supra*, 393 A.2d at 246. With respect to such statutes and regulations, "disputes concerning their interpretation, application or claimed violation would be cognizable as grievances subject to the negotiated grievance procedure contained in the agreement." *Twp. of West Windsor v. PERC, supra*, 393 A.2d at 264. And, disputes over the application of statutes or regulations setting terms or conditions of employment may be submitted to arbitration, if the grievance procedures so provides. *Teaneck Bd. of Ed. v. Teaneck Ed. Ass'n*, 94 N.J. 9, 462 A.2d 137, 140 (1983). "To this extent, the scope of grievability is more expansive than the scope of negotiability." *Twp. of West Windsor v. PERC, supra*, 393 A.2d at 294.[3]

Given this rule and the fact that preemptive regulations may be issued by the very state agency with which a union otherwise negotiates, the New Jersey Supreme Court developed a rule of qualified preemption where regulations have been adopted by an employer:

> [I]f the agency acts in dual capacities and promulgates a regulation affecting employees under its

[3] As we have noted, statutes and regulations can also affect collective negotiations by setting a range within which bargaining can take place. "If the legislation, which encompasses agency regulations, contemplates discretionary limits or sets a minimum or maximum term or condition, then negotiation will be confined within these limits." *Bethlehem Twp. Bd. of Ed. v. Bethlehem Twp. Ed. Ass'n*, 91 N.J. 38, 449 A.2d 1254, 1257 (1982). "Thus, where a statute or regulation mandates a minimum level of rights or benefits for public employees but does not bar the public employer from choosing to afford them greater protection, proposals by the employees to obtain that greater protection in a negotiated agreement are mandatorily negotiable." *State v. State Supervisory Employees Ass'n, supra*, 393 A.2d at 246.

"For example, *N.J.A.C.* 9:2-3.6 [a regulation adopted by the State Board of Higher Education] allows the Board 'at least two weeks' in which to give notice of proposed layoffs. Setting a longer period of time for giving notice remains open to negotiation. And *N.J.A.C.* 9:2-3.7 requires the Board to give layoff notices to individual employees 'as soon as possible.' This indefinite time frame also remains open for negotiation. In regard to reemployment, *N.J.A.C.* 9:2-3.8 authorizes the rehiring of faculty members 'who the President believes, as a result of his academic judgment, are qualified to fill the position.' The procedures relating to rehiring, including notice and rudimentary due process, vitally affect employment interests and are negotiable." *New Jersey State College Locals v. State Board of Higher Ed., supra*, 449 A.2d at 1252 (discussing the effect of regulations adopted by the State Board of Higher Education on negotiations between teachers unions, on one hand, and state colleges and the Board, on the other).

> control, its regulations establishing terms and conditions of employment will not necessarily preempt negotiation on the subject matter covered therein. In this latter setting, preemption will be presumed. However, that presumption can be overcome by demonstrating that the regulations were arbitrary, adopted in bad faith, or passed primarily to avoid negotiation on terms and conditions of employment. [*New Jersey State College Locals v. State Bd. of Higher Ed.*, *supra*, 449 A.2d at 1249.]

On the other hand, "if the agency acts solely as a regulator and has no direct employer interest over the employees affected, its regulations fixing terms and conditions of employment must be given the same preemptive effect as a statute." *Id.* Even where an employer-agency has properly adopted preemptive employment regulations, the union is entitled under the New Jersey Constitution to discuss with the agency proposals to change the regulation, either to make the matter negotiable or to change the terms set by regulation. *Probation Officers v. Passaic County*, 73 N.J. 247, 374 A.2d 449, 454 (1977).[4]

C. Terms and Conditions of Employment on Which Negotiated Agreement Might Significantly Interfere With the Determination of Government Policy.

The New Jersey statute excludes from collective negotiations any public employment decision that "is preeminently a governmental policy responsibility that would be significantly encumbered or impaired if it were subject to mandatory negotiations." *New Jersey State College Locals v. State Bd. of Higher Ed.*, *supra*, 449 A.2d at 1251. "Where an express or inherent management prerogative is the dominant factor [in an employment

[4] Because an agency's regulatory authority ultimately derives from statutory law, a union may challenge the validity of a preempting employment regulation on the grounds that it exceeds the scope of the agency's authority or conflicts with a statute. *See, e.g., New Jersey State College Locals v. State Bd. of Higher Ed.*, *supra*, 449 A.2d at 1253-54.

decision], the subject is not negotiable," and "[n]ot even the impact of such a subject on employment conditions is negotiable. . . ." *Patterson Police Local 1 v. City of Patterson*, 87 N.J. 78, 432 A.2d 847, 854 & n.3 (1981).[5] *Compare First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681 (1981) (discussing "'effects' bargaining mandated by [NLRA] § 8(a)(5)"). This exclusion of matters affecting determination of government policy is part of the definition of mandatorily negotiable subjects, and is in addition to the statutory and regulatory preemption of collective negotiations just discussed. *State v. State Supervisory Employees Ass'n*, *supra*, 393 A.2d at 67 & 80.[6]

[5] For example, "neither the decision to reduce teaching staff nor the impact of such a reduction is negotiable." *New Jersey State Locals v. State Bd. of Higher Ed.*, *supra*, 449 A.2d at 1251, citing *In re Maywood Bd. of Ed.*, 168 N.J. Super. 45, 55-58, 401 A.2d 711 (App. Div.), *certif. denied*, 81 N.J. 292, 405 A.2d 836 (1979).

[6] Under New Jersey law, moreover, "[a] matter that is not legally negotiable in the first place cannot be arbitrable." *Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed.*, *supra*, 393 A.2d at 286. Thus, unlike statutes or regulations setting terms and conditions of employment, which may be subject to arbitration, employment decisions affecting the formulation of government policy may *not* be subjected to final and binding arbitration. *Id. See, e.g., Old Bridge Bd. of Ed. v. Old Bridge Ed. Ass'n*, 98 N.J. 523, 489 A.2d 159, 163-164 (1985). "Unlike the private sector, prerogatives of management [in the New Jersey public sector], particularly those involving governmental policy making, cannot be bargained away to be determined by an arbitrator." *Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n*, *supra*, 462 A.2d at 139 (1983).

The rigor of that basic rule, however, is tempered by the refinement that "[a]lthough the scope of arbitrability is limited by the test for negotiability, . . . the scope of matters about which public employees must be able to present grievances . . . is broad, exceeding the scope of issues that may be submitted to binding arbitration." *Teaneck Bd. of Ed. v. Teaneck Ed. Ass'n*, *supra*, 462 A.2d at 139. *See also Red Bank Ed. Ass'n v. Red Bank Bd. of Ed.*, *supra*, 393 A.2d at 274 ("The ability to have grievances so presented where a majority representative exists is an integral element of the employees' rights under Art. I, para. 19 [of the New Jersey Constitution]."). If the collective agreement so provides, it is permissible

New Jersey has excluded employment decisions implicating the formation of government policy on the ground that "[m]atters of public policy are properly decided, not by negotiation and arbitration, *but by the political process*[,] . . . *including public debate, lobbying, voting, legislation and administration.*" *IFPTE Local 195 v. State, supra*, 443 A.2d at 191 (emphasis added). The decision to exclude employment-related policy decisions from negotiations is *not* based on a determination that majority representatives have nothing of relevance to say on such matters. To the contrary, the New Jersey Supreme Court has gone so far as to "encourage[] the establishment of grievance procedures for [such] issues," as a means to "provide an expedited resolution of . . . claims and clear the air of much misunderstanding." *Teaneck Bd. of Ed. v. Teaneck Ed. Ass'n, supra*, 462 A.2d 142. In other words, the legislative intent was not to silence such representatives on employment-related issues, but to provide for legislative determination so that the decision would be the product of a wider discussion. *Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., supra*, 393 A.2d at 287; *Patterson Police Local 1 v. City of Patterson, supra*, 432 A.2d at 854.

To state that government policy issues are not negotiable is not to define with precision what is a government policy issue. And that process of definition has proved to be a large undertaking. "[W]hether an issue is appropriately decided by the political process or by collective negotiations," requires a "sensitive determination" of the relative weight of "the competing interests of the State and its employees. . . ." *IFPTE Local 195 v. State, supra*, 443 R.2d at 191. The New Jersey Supreme Court has made clear that this weighing process requires more than "the mere invocation of abstract categories like 'terms and conditions of employment' and 'managerial prerogatives'. . . ." *Id.* Rather, "[i]ts resolution depends upon several factors." *Woodstown-Pilesgrove Bd. of Ed. v. Woodstown-Pilesgrove Ed. Ass'n*, 81 N.J. 582, 410 A.2d 1131, 1134 (1980).

for the grievance procedure to culminate in *advisory* arbitration regarding policy-related employment decisions. *Bernards Bd. of Ed. v. Bernards Ed. Ass'n*, 79 N.J. 311, 399 A.2d 620, 628 (1979).

The first consideration is "whether the public employer is exercising an inherent or express managerial prerogative." *Id.* This turns on the employer's authority under statutes other than the Employer-Employee Relations Act. If an employment decision "is a matter of essential managerial prerogative which has been delegated by the Legislature to the [employer], it cannot be bargained away." *Id.* (internal quotation marks omitted). Thus, "[i]f the employer has acted pursuant to a managerial prerogative, the inquiry may end at this point." *Id.* However, if the employer's decision "falls within the general category of management authority," the concrete circumstances surrounding the decision must be considered in a "weighing or balancing" of the State's interest in "a viable bargaining process in the public sector" against its interest in opening policy decisions to public debate. *Id.* at 1134 & 1135.

Given the nature of the inquiry defined by the New Jersey Supreme Court, there is often a fine line between negotiable and nonnegotiable decisions. Most notably, that Court has recognized that while a policy decision itself is not negotiable, employment-related questions about the procedure for implementing the policy decision are negotiable. *New Jersey State College Locals v. State Bd. of Higher Ed., supra*, 449 A.2d at 1251. For example, "promotional criteria are not mandatorily negotiable while promotional procedures are so negotiable." *State v. State Supervisory Employees Ass'n, supra*, 393 A.2d at 251.

The primary focus is often on the duties assigned to the employer-agency by the legislature, and the effect of the employment-decision on carrying out those duties. Thus, the Court determined that a proposal for five days notice prior to classroom visitations for teachers evaluation would interfere with the School Board's duty to

evaluate teachers. *Bethlehem Twp. Bd. of Ed. v. Bethlehem Twp. Ed. Ass'n*, 91 N.J. 38, 449 A.2d 1254, 1260 (1982). At the same time, the New Jersey Court determined that a proposal to limit successive classroom visitations/observations would not significantly interfere with the School Board's duty, and thus was mandatorily negotiable. *Id.* at 1261.

In determining the possible effect of negotiations on policy formulation, the New Jersey courts consider the likely impact of the particular proposal being advanced by the union. For instance, while decisions to transfer employees are not generally negotiable, a proposal that would limit the transfer of a relatively small number of employees may be negotiable. *IFPTE Local 195 v. State*, *supra*, 443 A.2d at 200-201. Similarly, the size of the employer's workforce has been a determinative factor in whether or not a union proposal on work scheduling is mandatorily negotiable. *Twp. of Mt. Laurel v. Mt. Laurel Police Officers Ass'n*, 215 N.J. Super. 108, 521 A.2d 369, 372-373 (App. Div. 1987).

In short, many decisions New Jersey excludes from collective negotiation because of their effect on formulation of government policy nonetheless have important effects on the terms and conditions of public employees. Whether a decision is mandatorily negotiable is determined by a close examination of the public employer's statutory authority and duties, and a careful weighing of the competing state interests in peaceful labor relations and public debate over policy decisions, all within the context of the particular employment setting and the particular demands under consideration.

III. NEW JERSEY'S INTEREST IN PERMITTING UNIONS TO USE REPRESENTATION FEES TO FINANCE LOBBYING ON TERMS AND CONDITIONS OF EMPLOYMENT.

Having explored this complex body of labor-management relations law in some detail, we are now in a position to return to a consideration of why the New Jersey Legislature has authorized unions to use representation fees for the "support of lobbying activities designed to foster policy goals in collective negotiations and contract administration or to secure for the employees represented advantages in wages, hours and other conditions of employment in addition to those secured through collective negotiations with the public employer," N.J.S.A. 34:13A-5.5c, and why the New Jersey Supreme Court has determined that this authorization "furthers the state's significant interest in public-employment stability. . . ." *Boonton Bd. of Ed. v. Kramer*, *supra*, 494 A.2d at 292.

A. Lobbying on "Policy Goals in Collective Negotiations and Contract Administration."

The State's interest in furthering the ability of a majority employee representative to state its position to the Legislature with respect to "policy goals in collective negotiations and contract administration" is part and parcel of its overall interest in the statutory collective bargaining system. The New Jersey Supreme Court has stated that the point of that system is to provide public employers and public employees "with an *effective* procedure for the *mutual* resolution of disputes," *Lullo v. Fire Fighters Local 1066*, *supra*, 262 A.2d at 685 (emphasis added). If that goal is to be realized, the Legislature must know whether the employees believe that the system is "effective" and whether the resolutions the system achieve are "mutual" and if not what changes will make the system work as it is intended to work.

Not surprisingly, there have been numerous union suggestions for change and on a number of occasions, the Legislature has responded to proposals to broaden the scope of collective negotiations by amending the Employer-Employee Relations Act. For example, in 1974 the legislature amended N.J.S.A. 34:13A-8.1 to provide that an administrative agency's *authority* to promulgate employment regulations does not preempt collective negotiations, only regulations actually adopted do so.

State v. State Supervisory Employees Ass'n, supra, 393 A.2d at 246. Similarly, the legislature amended the Act to create a limited category of permissive subjects of negotiation for police and firemen. *Twp. of Mt. Laurel v. Mt. Laurel Police Officers Ass'n, supra*, 462 A.2d at 371 & n.1. Since these changes affect the role of unions as majority representatives, and do not affect workplaces where there is no union representative, it seems self-evident that the Legislature would have been most interested in hearing the views of unions before adopting such amendments, and would have been severely handicapped in its deliberations if there were no provision for the expression of those views.

B. Lobbying on Statutes and Regulations That Set Terms and Conditions of Employment.

New Jersey statutes and regulations that establish "terms and conditions of employment" have a direct and immediate impact on the role of the majority representative in the statutory system of collective negotiation and grievance resolution. As already explained, such statutes and regulations preclude bargaining on matters that would otherwise be subject to collective negotiation, and are effectively incorporated into the collective agreement and are subject to the agreement's grievance procedure. *State v. State Supervisory Employees Ass'n, supra*, 393 A.2d at 246; *Twp. of West Windsor v. PERC, supra*, 393 A.2d at 264. Thus, not only is the majority representative precluded from negotiating with respect to the terms set by these statutes and regulations, the union is required to enforce these terms in representing employees through the grievance procedure. *See Lullo v. Fire Fighters Local 1066, supra*, 262 A.2d at 694.

Precisely because there is such a close relationship between statutes and regulations setting terms and conditions of employment and collective negotiations and grievance handling, the New Jersey Supreme Court has recognized that "a public employee union that ignored this

reality would not represent properly the members and nonmembers in its bargaining unit." *Boonton Bd. of Ed. v. Kramer*, 494 A.2d at 291. We do not see how any other conclusion is possible. That "collective bargaining is inextricably intertwined with legislative change," *Robinson v. New Jersey, supra*, 741 F.2d at 609, becomes apparent when the three instances in which union lobbying directly addressed to employment terms might occur are considered.

(i) Because statutes and regulations may preempt the terms of collective agreements, it is always possible that a change in a statute or regulation will invalidate what was once a valid term of a collective agreement and replace it with another term. The same interest in labor peace that justified the agreement in the first place is served by allowing the majority representative to defend the agreement. *See supra* pp. 10-11 (discussing the State interest as articulated by the New Jersey Supreme Court). The employees are not likely to feel that they have participated in "an effective procedure for the mutual resolution of disputes involving terms and conditions of employment," *Lullo v. Fire Fighters Local 1066, supra*, 262 A.2d at 685, if having once reached agreement through that procedure the employees as a group must stand by mute while the agreement is changed through the legislative or regulatory process.

This is especially so if the New Jersey Court's perception is correct and those employees are peculiarly disadvantaged when their terms of employment are considered in the political arena. *Twp. of West Windsor v. PERC, supra*, 393 A.2d at 262. Moreover, the better understanding achieved by the exchange of views during negotiations is lost if the union does not express its views to the legislature or agency that intends to substitute statutory or regulatory provisions for those contained in the collective agreement.[7] Finally, the public employer

[7] "The chief advantage which comes from the practice of periodically determining the conditions of labor by collective bargaining

will undoubtedly have the opportunity to express its views, and the State has an obvious interest in hearing the views of *both* the employer and the union before it acts to change certain terms of their agreement.

(ii) Where an existing statute or regulation preempts negotiations on a particular term of employment, the union may lobby to change the statute or regulation in order to open the matter to bargaining or to ratify a tentative agreement reached with the employer. Both activities are closely related to collective negotiations.

When a union lobbies to change a statute or regulation that preempts collective negotiations, its activity is a necessary prelude to negotiations. The State interest in fostering this sort of union activity is identical to its interest in establishing a system of collective negotiations. Indeed, since the very employer with which the union negotiates may have promulgated the preemptive regulation, this sort of union lobbying is a particularly close analogue to collective negotiations. *New Jersey State College Locals v. State Bd. of Higher Ed., supra,* 449 A.2d at 1249. While the exclusive representative does not have a statutory right to negotiate for changes of the preemptive regulation, the union does have a right under the New Jersey Constitution to present proposals to the employer for a change in the regulation. *Probations Officers' Ass'n v. Cty. of Passaic, supra,* 374 A.2d at 454. In lobbying of this sort, the union would be engaged in discussions with the same agency and on the same subject matter as would otherwise occur in collective negotiations. A change in the regulation does, of course, involve public debate that would not be part of collective negotiations, but the New Jersey Constitution

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directly between employers and employees is that thereby each side obtains a better understanding of the actual state of the industry, of the conditions which confront the other side, and of the motives which influence it." Wellington & Winter, *The Unions and the Cities* 8 (1970) quoting *Final Report of the Industrial Commission* (1902).

gives the employees an enhanced voice and confers an official status on their representative in that debate. *Twp. of West Windsor v. PERC, supra,* 393 A.2d at 262; *Red Bank Reg. Ed. Ass'n v. Red Bank Bd. of Ed., supra,* 393 A.2d at 135.

While employers and unions may not reach a binding agreement with respect to a term of employment set by statute or regulation, they may "discuss desirable changes in this vein and even go so far as jointly to present recommendations concerning such changes to the Legislature or to the Civil Service Commission." *State v. State Supervisory Employees Ass'n, supra,* 393 A.2d at 249-250. *See, e.g., Policemen Benevolent Ass'n v. PERC,* 187 N.J. Super. 202, 453 A.2d 1373 (App. Div. 1982), *certif. denied,* 93 N.J. 269, 460 A.2d 672 (1983).

This is a particularly common phenomenon with respect to the Department of Personnel (formerly the Civil Service Commission) regulations, since the Department is authorized to regulate many terms and conditions of state employment, *see, e.g.,* N.J.S.A. 11A:3-7 & 11A:6-24, and is required to consider employee proposals regarding such regulations, N.J.S.A. 11A:2-11m. While the "employer lacks the authority to bind the [Department of Personnel] by collective agreement," *State v. State Supervisory Employees Ass'n, supra,* 393 A.2d at 254, employers frequently agree to jointly approach the Department along with the union to request changes in regulations to allow tentatively agreed upon contract terms to take effect. Such lobbying is an immediate outgrowth of collective negotiations. Again the State interest in hearing such union proposals is identical to its interest in allowing collective negotiations.

(iii) Finally, the majority representative may support the adoption of legislation or a regulation that sets a term of employment in a way that is advantageous to represented employees, or that improves a term of employment already set by statute or regulation. If the union succeeds in this effort, the term is incorporated

into the collective agreement just as if it had been collectively negotiated directly with the employer. The union achieves precisely the same result through lobbying without first reaching agreement as it does in the first two examples by lobbying after reaching agreement. The difference is merely a tactical one, and if the first two sorts of lobbying further the State interest in "an effective procedure for the mutual resolution of disputes involving terms and conditions of employment," *Lullo v. Fire Fighters Local 1066*, *supra*, 262 A.2d at 685, the third sort must as well.

C. Lobbying on Government Policy Decisions that Directly Affect Terms and Conditions of Employment.

Under Art. I, para. 19 of the New Jersey Constitution, public employers must discuss personnel policy matters that are essentially managerial prerogatives with the majority representatives chosen by their employees. *Teaneck Bd. of Ed. v. Teaneck Ed. Ass'n*, *supra*, 462 A.2d at 142; *Probation Officers Ass'n v. City of Passaic*, *supra*, 374 A.2d at 454. While such matters are not subject to negotiation or binding arbitration, decisions with respect to personnel policy may be subject to the contractual grievance procedure and to advisory arbitration. *Bernards Bd. of Ed. v. Bernards Ed. Ass'n*, *supra*, 399 A.2d at 627. The State Supreme Court has repeatedly acknowledged the beneficial labor-relations effects of discussing employment-related policy decisions, even though such matters are not subject to collective negotiations. *Teaneck Bd. of Ed. v. Teaneck Ed. Ass'n*, *supra*, 462 A.2d at 142; *Bernards Bd. of Ed. v. Bernards Ed. Ass'n*, *supra*, 399 A.2d at 454.

As we have seen, New Jersey has taken care to insure that its employees are heard on matters affecting terms of employment, "because of the fact that the political interests of the governmental decision-makers and the economic interests of the voting public . . . are inherently

adverse to the employment interests of public employees. . . ." *Twp. of West Windsor v. PERC*, *supra*, 393 A.2d at 262. This conflict of interests exists just as much with respect to policy decisions made through the political process as with decisions consigned to collective negotiations. Moreover, the concern that, without a collective voice, employees' views would go unheard, due to their "trepidation" about putting themselves "on the line," applies just as much to decisions within the political process as it does to discussions within collective negotiations.

An example will show how these two basic considerations come into play in a typical non-negotiable policy determination. Under New Jersey law, employee transfers are considered an "essential managerial prerogative," and thus are not negotiable. *Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed.*, *supra*, 393 A.2d at 284. However, a transfer may affect employees in a variety of ways from such mundane matters as whether there will be adequate parking to more crucial matters such as the safety of the new location. These considerations may not occur to the legislators or administrators, who are frequently remote from the employment setting, but they are obviously relevant to whether the transfer is a good idea and are matters the decisionmaker would sensibly take into account. However, without some established channel for the expression of employee sentiment, the employees' point of view is not likely to reach the decisionmaker.

The close relationship between policy decisions affecting terms of employment and the terms established by collective negotiations justifies assigning a special role to the majority representative in the process of determining policy. In the first place, many of the terms of the collective agreement will be intertwined with the policy decision itself. This is so, because, while policy decisions are not negotiable, the procedure for implementing policy decisions is negotiable. *New Jersey State*

College Locals v. State Bd. of Higher Ed., supra, 449 A.2d at 1251.

If the employer is going to negotiate over the procedure for implementing a policy, it makes sense for the employer to hear the views of its employees on how the policy itself affects their employment, even though that is not open to negotiation. Moreover, decisions of personnel policy are likely to affect the positions taken by the majority representative on negotiable matters beyond implementation of the policy. This is so, because the employees, and consequently their representatives, do not tend to distinguish between their terms and conditions of employment that are negotiable and those that are not, they consider them by and large to be an integrated whole. Since the goal of the majority representative is to improve those terms as a whole, improvements or impairments in non-negotiable terms of employment are likely to be balanced by demands with respect to negotiable terms. Thus, the representative's views in this regard are also useful to the decisionmaker.

Employment matters that affect government policy were left non-negotiable by the New Jersey statute to insure that such matters would be decided in a forum where "citizen participation will not be precluded." *Patterson Police Local 1 v. City of Patterson, supra,* 432 A.2d at 854. *See Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., supra,* 393 A.2d at 287. It is not at all inconsistent with this goal for the legislature to encourage majority representatives to express the views of public employees by lobbying with respect to policy decisions that affect their terms of employment.

IV. NEW JERSEY'S LABOR RELATIONS INTERESTS JUSTIFY THE STATE'S DECISION TO ALLOW THE USE OF REPRESENTATION FEES FOR EMPLOYMENT-RELATED LOBBYING.

In *Abood v. Detroit Board of Education,* 431 U.S. 209, 219 (1977), this Court began by recognizing that it is

the legislature that "is charged with identifying '[t]he ingredients of industrial peace and stabilized labor-management relations,' " and that a legislative determination that "it would promote peaceful labor relations to permit a union and an employer to conclude an agreement requiring employees who obtain the benefit of union representation to share its costs, [is] . . . surely an allowable one." While "compel[ling] employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests," the holding of *Abood* is that "such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by [the legislature]." *Id.* at 222.

The New Jersey Legislature has designed a public sector labor relations systems in which some decisions affecting terms of emyployment are assigned to collective negotiations, and some are assigned to the legislative and regulatory processes. The Legislature has determined, moreover, that it is beneficial for those deciding non-negotiable employment-related questions to hear the views of the employees' majority representatives, and to this end the legislature has allowed unions to use representation fees for employment-related lobbying.

As the foregoing discussion demonstrates in some detail, the New Jersey Supreme Court was correct in its conclusion that "the state's significant interest in public-employment stability" justifies the authorization for lobbying charges in the New Jersey Employer-Employee Relations Act. *Boonton Bd. of Ed. v. Kramer, supra,* 494 A.2d at 292. As we have seen, "many of the most important benefits of public employment are determined by statute" and regulation. *Id.* at 291. "[A] public employee union that ignored this reality would not represent properly the members and nonmembers in its bargaining unit." *Id.* In adopting the Employer-Employee Relations Act, the New Jersey legislature did not "seek the creation of ineffectual public employee unions, ..."

Robinson v. New Jersey, supra, 741 F.2d at 609. To the contrary, the legislature was motivated by the perceived need for "an effective procedure for the mutual resolution of disputes involving terms and conditions of employment." *Lullo v. Fire Fighters Local 1066, supra*, 262 A.2d at 685. The authorization to use representation fees for employment-related lobbying is plainly "reasonably related to the advancement of such goals," and thus is an allowable legislative choice under the First Amendment. *Keller v. State Bar of California, supra*, 110 S.Ct. 2228, 2237 (1990).

CONCLUSION

For the above-stated reasons as well as those stated by the respondent, the judgment below should be affirmed.

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